IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 12TH JANUARY 2007 / 22ND PAUSHA 1928

CRP.No. 575 of 2005()

AGAINST THE ORDER DATED 31/01/2005 IN IA.3712/02,3713/02 IN OS.342/2000 of II ADDL.SUB COURT,ERNAKULAM

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REVN. PETITIONER: PETITIONERS/DEFENDANTS:

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1. M/S. C.K. THOMAS & COMPANY
   PARTNERSHIP FIRM, CHEMPAKASSERRY,
   RESIDENCY ROAD, QUILON, REPRESENTED BY ITS
   MANAGING PARTNER SRI. MANUEL THOMAS.

2. SRI. MANUEL THOMAS,
   S/O. MR. C.K. THOMAS, DO. DO.

3. MRS. SHERLY MANUEL, W/O. MANUEL THOMAS,
   DO. DO.

4. MRS. LILLY THOMAS, W/O. MR. C.K. THOMAS,
   DO. DO.

BY ADV. SRI.V.PHILIP MATHEW

RESPONDENTS: PLAINTIFF:

MUTHOOT HEARING AND FINANCE LTD.,
REGISTERED OFFICE AND HEAD OFFICE AT
MUTHOOT CHAMBERS OPPOSITE SAVITHA THEATRE
COMPLEX, BANERJI ROAD, ERNAKULAM, COCHIN-18.

BY ADV. SRI.ABRAHAM MATHEW (VETTOOR)

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 12/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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C.R.P.No.575 OF 2005

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DATED THIS THE 2ND DAY OF FEBRUARY, 2007

ORDER

The point for consideration is when a suit instituted under the provisions of Order XXXVII, after the defendant filed written statement, was decreed exparte, whether an application can be filed under Rule 4 of Order XXXVII to set aside the decree ? If an application is to be filed under Order IX Rule 13 to set aside the decree, whether a revision will lie if such an application and the application filed under Section 5 of Limitation Act, are dismissed.

2. Petitioners are the defendants in O.S.342 of 2000. Respondent is the plaintiff. The suit was admittedly instituted as a summary suit as provided under Order XXXVII of Code of Civil Procedure. Appellants appeared and filed a written statement. When the case was posted for evidence, they remained absent. An exparte decree was passed on 29.6.2002. Petitioners filed I.A.3712 of 2002 and I.A.3713 of 2002, an application under Section 5 of the Limitation

Act to condone the delay of 49 days in filing the other application and an application under Order IX Rule 13 and Section 151 of Code of Civil Procedure to set aside the exparte decree.

3. The learned Sub Judge, as per common order dated 31.1.2005 dismissed the application holding that there is no sufficient cause either for the absence of the petitioners when the suit was decreed exparte or sufficient reason to condone the delay of 49 days in filing the application. This revision petition is filed challenging the said order.

4. Learned counsel appearing for the petitioners and respondent were heard.

5. The argument of learned counsel appearing for petitioners is that under Rule 4 of Order XXXVII, a defendant is entitled to apply to set aside the decree passed exparte under special circumstances and therefore though the application was filed under Rule 13 of Order IX and Section 151 of Code of Civil

Procedure, it was in fact an application under Rule 4 of Order XXXVII. It was argued that as no appeal is provided against dismissal of an application filed under Rule 4 of Order XXXVII under Order XLIII Rule 1 of Code of Civil Procedure, the only remedy available to the petitioners is to challenge that order as provided under Section 115 of Code of Civil Procedure and therefore the revision is maintainable. It was also argued that petitioners produced a Medical Certificate to prove that second petitioner, the only male member looking after the affairs of the firm and who is also the managing partner of the firm, was laid up and that fact was not seriously challenged and therefore in the interest of justice court below should have set aside the exparte decree and permitted petitioners to have a decision on merits. Though learned counsel relying on the decision of the Apex Court in Rajni Kumar V. Suresh Kumar Malhotra (2003(5)SCC 315)argued that in that case a revision was filed before the High Court, which was

challenged before the Apex Court and therefore a revision is maintainable, as is clear from the judgment that was a case where the defendant did not appear on receipt of summons and therefore the decree sought to be set aside in that case was only be a decree passed as provided under Rule 3 of Order XXXVII and therefore an application under Rule 4 will lie. That cannot be applied to a case where the decree is not passed as contemplated under Rule 3, but at a subsequent stage.

6. Learned counsel appearing for respondent argued that Rule 4 of Order XXXVII applies only to a case where a judgment was pronounced as provided under Rule 3 of Order XXXVII and not when the suit was decreed subsequent to the stage of Rule 3, when the case was posted for evidence. It was argued that as provided under Rule 7 the procedure to be followed after the post Rule 3 stage is the other provisions of the Code and therefore the learned Sub Judge rightly considered

the application as one under Order IX Rule 13.

7. Relying on the decision of the Apex Court in Bhanu Kumar V. Archana Kumar(2005(1) KLT 456)it was argued that when an application under Order IX, Rule 13 of the code is dismissed, the defendant can only avail one remedy available viz, to prefer an appeal in terms of Order XLIII Rule 1 of the Code and it was argued that hence the revision is not maintainable.

8. The question is whether an application under Rule 4 of Order XXXVII will lie, once the stage provided under Rule 3 is over and the suit was decreed on the failure of the defendant to appear, when the suit was posted for evidence. Rule 4 of Order XXXVII reads:-

> **"Power to set aside decree :-** After decree the court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such

terms as the court thinks fit".

9. A reading of Rule 4 itself is sufficient to show that the decree contemplated under Rule 4 is a decree passed as provided under sub rule 6 of Rule 3 of Order XXXVII. Rule 3 provides the procedure to be followed in a summary suit, after its institution. Sub rule 6 provides that at the hearing of summons for judgment served as provided under sub rule 4, if the defendant has not applied for leave to defend as provided under sub rule 5 or if such an application has been made and is refused, the plaintiff shall be entitled to a judgment forthwith as provided under sub-clause (a) therein. If the defendant is permitted to defend as to the whole or any part of the claim, the court may direct him to give such security within such time as may be fixed by the court. If the defendant fails to give such security within the time specified by the court or fails to carry out such other directions as may be given by the court, the plaintiff

is entitled to a judgment forthwith as provided under clause(d). Sub- rule 7 of Rule 3 enables a defendant to apply for leave to defend the suit on showing sufficient cause to excuse the delay in entering appearance or in applying for leave to defend the suit before pronouncing the judgment as provided under sub-rule 6. The decree provided under Rule 4 is a decree passed as provided under sub-rule 6 of Rule 3. Rule 4 provides that after such a decree was passed, under special circumstances, a defendant can apply to set aside the decree and the court may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court. Therefore it gives no room for doubt that the decree provided under Rule 4 is a decree passed by the court under sub rule 6 of rule 3 either on the failure of the defendant to apply for leave to defend the case or on refusal of the application to defend the case or on failure to comply with the direction to furnish security or such other

direction as may be passed by the court.

10. Rule 7 of Order XXXVII reads:-

> "**Procedure in suits** :-save as provided by this order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner".

11. It is therefore clear that after the stage of Rule 3, the court has to follow the procedure provided under the Code for trial of the suit. Therefore when the suit was posted for evidence and the defendant fails to appear, the court is competent to grant the decree following the procedure provided under Order IX. When a suit stand decreed exparte, the remedy of the defendant is to apply to set aside the decree as provided under Order IX Rule 13. Therefore the application filed by the petitioner can only be treated as an application under Rule 13 of Order IX of Code of Civil Procedure.

12. When such an application is dismissed, the

only remedy available to the petitioners is to file an appeal as provided under Order XLIII Rule 1. Petitioners are not entitled to file a revision on the ground that it is a decree passed under Rule 4 of Order XXXVII. Under sub section 1 of Section 115 of the Code, a revision is maintainable only if no appeal lies against the order. When petitioners have a right of appeal under Rule 1(d) of Order XLIII, no revision is maintainable. When the application under Rule 13 of Order IX and the application under Section 5 were dismissed by a common order, the remedy of petitioners is to challenge the order in an appeal as under Rule 1 (d) of Order XLIII, an appeal lise. Even if the application under Rule 13 of Order IX was dismissed on the dismissal of the application filed under Section 5 of Limitation Act nevertheless it is an order in the application under Rule 13 of Order IX.

13. The revision is not maintainable. Revision petition is dismissed with liberty to petitioners to

challenge the order in an appeal as provided under Rule 1 of Order XLIII.

M.SASIDHARAN NAMBIAR,
JUDGE

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